TRANSCRIPT OF

SUPREME COURT OF THE UNITED

OCTOBER TERM, 1906.

No. 90.

THE NEW YORK COUNTY NATIONAL BANK,
APPELLANT,

vs.

ALBERT P. MASSEY, TRUSTEE IN BANKRUPTCY OF
GEORGE H. STEGE AND FREDERICK H. STEGE.

APPEAL FROM THE

(18,611.)

SUPREME COURT OF THE UNITED STATES.

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vs.

ALBERT P. MASSEY, TRUSTEE IN BANKRUPTCY OF GEORGE H. STEGE AND FREDERICK H. STEGE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

In the Matter of FREDERICK H. STEGE and GEORGE H. STEGE, Bankrupts; ALBERT P. MASSEY, Trustee, Appellant.

Transcript of Record.

Appeal from the district court of the United States for the southern district of New York.

Printed under the direction of the clerk.

[Stamped:] United States circuit court of appeals, second circuit. Filed Feb. 27 1902 William Parkin, clerk.

1 United States District Court, Southern District of New York.

In the Matter of FREDERICK H. STEGE and GEORGE H. STEGE, Bankrupts.

Statement.

1900.
Feb. 8.—Claim proved.
1901.
June 12.—Claim allowed.
" 13.—Petition for review filed.
Aug. 2.—Referee's certificate filed.
Sep. 25.—Notice of motion to review referee's ruling.
Nov. 19.—Opinion, Adams, *J.*, affirming referee.
" 25.—Order of affirmance filed.
Dec. 4.—Trustee's notice of appeal, allowance and citation filed.
" " Assignment of errors filed.

2 In the District Court of the United States for the Southern District of New York.

In the Matter of FREDERICK H. STEGE and GEORGE H. STEGE, Bankrupts.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

At New York city, borough of Manhattan, in said southern district of New York, on the 8th day of February, A. D. 1900, came Francis M. Breese, of New York city, in the county of New York, State of New York, and made oath and says:

That he is the cashier of the New York County national bank, a domestic corporation incorporated by and under the banking laws of the United States, carrying on business at No. 79 Eight- avenue,

in the city, county and State of New York, and that he is duly authorized to make this proof, and says that the said Frederick H. Stege and George H. Stege, the persons by whom a petition for an adjudication of bankruptcy has been filed, were at and before the filing of said petition and still are justly and truly indebted to said corporation in the sum of thirty-three thousand seven hundred and ninety and $\frac{25}{100}$ dollars ($33,790.25), together with the interest thereon to be computed on the amount of each of the four several notes hereto annexed, from the dates of their respective maturity.

3 That the said debt exists upon four promissory notes discounted by the said New York County national bank, as follows:

Promissory note dated October 26, 1899, made by Stege & Brother to "ourselves," for $10,000, due January 26, 1900, upon which note there has been credited the sum of $6,209.75, leaving a balance due of $3,790.25.

Promissory note dated October 26, 1899, made by Stege & Brother to "ourselves," for $10,000, due January 26, 1900.

Promissory note dated December 2, 1899, made by Stege & Brother to "ourselves," for $10,000, February 8, 1900.

Promissory note dated November 25, 1899, made by Stege & Brother to "ourselves," for $10,000, due February 8, 1900.

That the consideration of said debt is as follows: Money advanced on account of said notes.

That no part of said debt has been paid, and that there are no set-offs or counterclaims to the same, except as hereinbefore set forth, and that no judgment has been recovered on said notes, and that said corporation has not, nor has any person by its order or to the knowledge or belief of said deponent for its use had or received any manner of security for said debt whatsoever.

FRANCIS M. BREESE,
Cashier of New York — National Bank.

Subscribed and sworn to before me this 8th day of February, 1900.

LEWIS L. PIERCE,
[SEAL.] *Notary Public* (44), *City and Co. of New York.*

Statement of the Affairs of Siege Bro.

17 Jay Street, New York.

As at January 22, 1900.

Liabilities.			Assets.		
$20,000 due Jan. 26. 20,000 due Feb. 9.					
To bills payable		$40,000 00	By cash at bank	$218 50	
" G. W. Martin & Bro		12,546 71	" " on hand	166 64	
" Fitch, Rowland & Co		12,045 14			$385 14
" J. A. Rosenbaum & Co		1,262 76	" inventory (market value)	$3,702 00	
			Less 10 %	370 20	
					3,331 80
			" sundry debtors (considered good)	$16,809 69	
			Less 10 %	1,680 96	
					15,128 73
			" 2 exchange tickets, $125		250 00
Total liabilities		$65,854 61	Total assets		$19,095 67
			Deficiency		46,758 94
		65,854 61	Less than 29 %		$65,854 61

93396

5 United States District Court for the Southern District of New York.

In the Matter of GEORGE H. STEGE and FREDERICK H. STEGE, Bankrupts. In Bankruptcy.

At the city and county of New York, in said district, on the 12th day of June, 1901.

The trustee having made a motion before me that the claim of the New York County national bank, a creditor, which claim has heretofore been allowed by me in the sum of $33,750.25, be disallowed and expunged from the list of claims upon said trustee's record herein, unless the said New York County national bank shall surrender an alleged preference, claimed by the said trustee to have been received by the said New York County national bank; now, upon the proof of claim herein and the evidence taken before me with regard to said claim, and after hearing Hill, Sturcke & Andrews, attorneys for the trustee, in support of said motion, and Bowers & Sands, attorneys for the New York County national bank, in opposition thereto,

It is ordered on motion of Bowers & Sands, attorneys for the New York County national bank, that the said motion be and hereby is denied, and that the claim of the New York County national bank stand as heretofore allowed.

PETER B. OLNEY,
Referee in Bankruptcy.

6 United States District Court for the Southern District of New York.

In the Matter of GEORGE H. STEGE and FREDERICK H. STEGE, Bankrupts. In Bankruptcy.

To the Hon. Peter B. Olney, referee in bankruptcy:

The petition of Albert P. Massey, trustee in bankruptcy of the above named bankrupts, respectfully shows: that There-fore, to wit, on the 12th day of June, 1901, an order was made by you herein denying your petitioner's motion to disallow and to expunge from the list of claims upon your petitioner's record herein the claim of the New York County national bank, a creditor, unless the said creditor surrender a preference claimed by your petitioner to have been received by the said creditor. That your petitioner deems himself aggrieved by the said order, and alleges that the same is erroneous in fact and in law in that it appears from the proceedings had and from the evidence taken before you with regard to the claim of the said New York County national bank that the said New York County national bank received an undue and illegal preference, contrary to the statute.

Wherefore, your petitioner prays, pursuant to rule XXVII. of the general orders in bankruptcy, that you will certify to the Hon.

Addison Brown, judge of the United States district court for the southern district of New York, for his review and consideration, the question presented with regard to the claim of the New York County national bank, together with the evidence taken before you relative thereto, and your findings and order thereon.

Dated New York, June 13, 1901.

ALBERT P. MASSEY,
Trustee in Bankruptcy.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

Albert P. Massey, being duly sworn, deposes and says: That he is the trustee in bankruptcy of George H. Stege and Frederick H. Stege and the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

ALBERT P. MASSEY.

Subscribed and sworn to before me this 13th day of June, 1901.
SIDNEY C. CHAMBERS,
Notary Public, Westchester Co.

Cert. filed in N. Y. Co.

United States District Court for the Southern District of New York.

In the Matter of GEORGE H. STEGE and FREDERICK H. STEGE, Bankrupts.

I, Peter B. Olney, one of the referees of said court in bankruptcy, do hereby certify, that in the course of the proceedings in the said case before me the following question arose pertinent to the said proceedings:

Whether the New York County National Bank, one of the creditors herein, has received a preference which, under section 57*g* of the bankruptcy act, it should be required to surrender before being allowed to prove its claim.

The following are the facts and circumstances out of which the question arose: For a number of years past the bankrupts, George H. Stege and Frederick H. Stege, were engaged, in the city and county of New York in the business of dealing in butter, eggs, &c., at wholesale under the firm, name and style of Stege & Brother. On January 27, 1900, they filed a voluntary petition of bankruptcy in this court, with liabilities of $67,232.49 and assets of $20,729.66, and upon the same day were duly adjudicated bankrupts.

Among their liabilities there was an indebtedness for $40,000 to the New York County National Bank for money loaned upon four

promissory notes for $10,000 each. The money was loaned
9 to the bankrupts and the notes were originally given as follows:

April 26, 1899, $10,000, 6 months, due October 26, 1899.
April 26, 1899, $10,000, 7 months, due November 26, 1899.
June 26, 1899, $10,000, 4 months, due October 26, 1899.
August 2, 1899, $10,000, 4 months, due December 2, 1899.

None of these notes were paid when they fell due, but all were renewed as follows:

October 26, 1899, $10,000, 3 months, due January 26, 1900.
November 26, 1899, $10,000, 75 days, due February 9, 1900.
October 26, 1899, $10,000, 3 months, due January 26, 1900.
December 2, 1899, $10,000, 69 days, due February 9, 1900.

On January 23, 1900, in the morning, the bankrupts went to the New York County national bank and asked the officers to have the two notes of $10,000 each, which fell due on January 26th, extended. The bankrupts at that time informed the bank officers that they were unable to pay the notes then about to fall due. In the afternoon of the same day, January 23, 1900, the bankrupts again called upon the bank officers, and at that time they delivered to them a statement of their assets and liabilities, which statement was not delivered until after the deposit of $3,884.47 had been made on that day. This statement showed their assets to be $19,095.67, and their liabilities $65,864.61; a copy of this statement is returned herewith as part of this certificate.

The bankrupts kept their bank account in the New York County national bank since May 6, 1899. On January 22, 1900, their
10 balance in the bank was $218.50. On the same day they deposited in that account $536.83; on January 23, 1900, $3,884.47; on January 25, 1900, $1,803.95, making a total of $6,225.25 deposited in the there days mentioned. Of this amount there was left in the bank account on the day of the adjudication in bankruptcy, January 27, 1900, the sum of $6,209.25. The bank having honored a check of Stege Bros. after the date of all these deposits.

At the first meeting of creditors, February 9, 1900, the New York County national bank filed its claim for $33,790.25. The original proof of claim is returned herewith as part of this certificate. The claim was allowed by me in the sum of $33,750.25, being $40,000 less the amount on deposit in the bank ($6,209.25) and a small rebate of interest on the unmatured notes. Some of the creditors, at this meeting, reserved the right to move to reconsider the claims of the New York County national bank; this request was granted. Subsequently, and on or about May 4, 1900, the trustee, as representative of the creditors, moved before me to disallow and to expunge from his list of claims the claim of the New York County national bank unless it surrender the amount of the deposit, viz., $6,209.25, which as appears from the proof of claim, had been credited by the bank upon one of the notes for $10,000, which became due on January 26, 1900. This motion was denied by me, and the order returned herewith was made and entered. The trus-

tee thereupon duly filed with me his petition to have the question involved certified to the judge; that petition is also returned as part of this certificate. My opinion upon the foregoing facts is as follows:

The question here is whether the making of the deposits by Stege & Brother with the New York County national bank constituted preferences.

Section 60 of the act declares that a person shall be deemed
11 to have given a preference if, being insolvent, he has, among other things, made "a transfer of any of his property," the effect of which will be to enable any of his creditors to obtain a greater percentage of his debt than any other creditors of the same class. Section 1 declares a "transfer" shall include the sale and every other and different made of disposing of or parting with property * * * "as a payment, pledge, mortgage, gift or security." The making of a deposit by a customer in his bank is none of these things.

These deposits were made in the usual course of business. When a deposit is made by a customer in his bank, the relation of debtor and creditor arises. The bank incurs a debt to the depositor in the amount of the deposit and agrees to honor the check of the customer drawn on the bank to the amount of the deposit.

By merely making a deposit, the customer does not make a payment of the amount of the deposit to the bank.

The fact that the bank knew of the insolvent condition of Stege & Brother when the last deposit of $1,800 was made, does not alter the situation. The making of such deposit was not a preference, within the definition quoted; nor does it make any difference that the officer of the bank asked the bankrupts on that day, if they had made a deposit. It appears that all checks drawn by the bankrupts were paid, the last check having been paid on January 24th, indicating that the business between the bankrupts and the bank was continued in the usual manner.

This is a case of "mutual debts or mutual credits," where one debt should be set off against the other, pursuant to section 68 of the act.

Hence the bank is entitled to prove the balance owing it after crediting the bankrupts with the amount of their deposit, and the claim of the bank must stand in the amount heretofore allowed.

Furthermore, I think at the time of the bankruptcy a
12 banker's lien in favor of the bank by operation of law attached to the deposit.

The motion made by the creditors and trustee is therefore denied.

And the question is accordingly certified to the judge for his opinion thereon.

Dated New York on the 2d day of August, 1901.

PETER B. OLNEY,
Referee in Bankruptcy.

Approved as to form.

BOWERS & SANDS,
Attorneys for N. Y. Co. Nat. Bank.

(Endorsed:) Filed Sept. 27, 1901.

United States District Court for the Southern District of New York.

In the Matter of GEORGE H. STEGE and FREDERICK H. STEGE, Bankrupts.

Please take notice, that upon the certificate made herein by the Hon. Peter B. Olney, referee in bankruptcy, we shall move before the Hon. George B. Adams, district judge for the southern district of New York, at the court room, in the United States post office building, in the county of New York, on the second day of October, 1901, at 10.30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for a review of the order made herein
13 by the Hon. Peter B. Olney, referee in bankruptcy, refusing to disallow the claim of the New York County national bank.

Dated New York, September 25, 1901.

HILL, STURCKE & ANDREWS,
Attorneys for Trustee, No. 52 William Street, New York, N. Y.

To Bowers & Sands, Esqs., attorneys for New York County National Bank, No. 35 Nassau street, New York, N. Y.

(Endorsed:) Filed Nov. 4, 1901.

Opinion of Judge Adams.

NOVEMBER 19, 1901.

It is my opinion that the deposits in question made by the bankrupts did not constitute a preference, but created the relation of debtor and creditor between them and the bank. The bank, therefore, was entitled to deduct the amount of the deposits from the debt due to it and to prove its claim for the balance. The denial by the referee of the motion to disallow the claim of the bank, unless it surrender the amount of the deposit, is affirmed.

G. B. A.

14 At a stated term of the United States district court for the southern district of New York, held in the Post Office building, in the borough of Manhattan, in the city of New York, on the 25th day of November, 1901.

Present: Hon. George B. Adams, judge.

In the Matter of GEORGE H. STEGE and FREDERICK H. STEGE, Bankrupts.

The trustee in bankruptcy of the above named bankrupts having applied to the Honorable Peter B. Olney, referee herein, to strike out the claim of the New York County national bank, a creditor, unless the said creditor should pay over to the trustee the sum of six thousand two hundred and nine and $\frac{25}{100}$ dollars ($6,209.25), which the trustee alleges was received by the said creditor as preference, whereby the said creditor received a greater percentage of its debt than other creditors of the same class; and the said referee having refused such direction, and having thereafter, upon the application of the trustee, certified the proceedings and evidence concerning the said application to the judge of this bankruptcy court for his opinion thereon; and the said matter having thereafter duly come on to be heard before the undersigned upon the said certificate, and upon the papers, proceedings and evidence in the case, and after having heard Mr. Louis Sturcke, of counsel for the trustee, in sup-
15 port of the application to strike out the claim of the said creditor unless it should pay over to the trustee the said sum of six thousand two hundred and nine and $\frac{25}{100}$ dollars ($6,209.25), and Mr. Latham G. Reed, of counsel for the creditor, in opposition thereto, and due deliberation being had, and the court having thereafter filed its opinion in writing denying the said application and affirming the ruling of the referee,

Now, on motion of Bowers & Sands, attorneys for the said creditor, the New York County national bank, it is

Ordered, that the said motion to disallow the claim of the New York County national bank, unless it shall pay over to the trustee the said sum of six thousand two hundred and nine and $\frac{25}{100}$ dollars ($6,209.25), be and the same is hereby denied, and the ruling of the said referee in the premises is affirmed.

GEO. B. ADAMS, *U. S. D. J.*

(Endorsed:) Filed Nov. 25, 1901.

16 United States District Court for the Southern District of New York.

In the Matter of GEORGE H. STEGE and FREDERICK H. STEGE, Bankrupts.

Albert P. Massey, as trustee of the above named bankrupts, conceiving himself aggrieved by the order made and entered in this cause on the 25th day of November, 1901, hereby appeals from said order to the United States court of appeals for the second circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said

order was made, duly authenticated, may be sent to the United States circuit court of appeals for the second circuit.
Dated December 4, 1901.

HILL, STURCKE & ANDREWS,
Attorneys for Albert P. Massey, as Trustee for George H. Stege and Frederick H. Stege, Bankrupts, No. 52 William Street, New York, N. Y.

The foregoing claim of appeal is allowed.
Dated December 4, 1901.

GEORGE B. ADAMS, *U. S. D. J.*

(Endorsed:) Filed Dec'r 4, 1901.

17 UNITED STATES OF AMERICA, *ss:*

To New York County National Bank, Greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals for the second circuit, to be held at the United States court room, in the Post Office building, in the county of New York, on the 31st day of December, 1901, pursuant to an appeal in the district court of the United States for the southern district of New York, wherein Albert P. Massey, as trustee for George H. Stege and Frederick H. Stege, bankrupts, is appellant and you are appellee, to show cause, if any there be, why the order passed against the said Albert P. Massey, as trustee as aforesaid, should not be reversed and speedy justice done to the parties in their behalf.

Witness the Honorable George B. Adams, judge of the district court of the United States for the southern district of New York, at the court room, in the Post Office building, in the county of New York, this 4th day of December, A. D. 1901, and of our Independence the 126th.

GEO. B. ADAMS, *Judge.*

Service of the foregoing citation is hereby accepted.
Dated New York, December 5, 1901.

BOWERS & SANDS,
Attorneys for New York County National Bank.

(Endorsed:) Filed Dec. 4, 1901.

18 United States District Court for the Southern District of New York.

In the Matter of GEORGE H. STEGE and FREDERICK H. STEGE, Bankrupts.

And now comes Albert P. Massey, as trustee for the above mentioned bankrupts, by Hill, Sturcke & Andrews, his attorneys, and says that the order made and entered in this cause on the 25th day

of November, 1901, is erroneous and against his just rights, and in violation of section 57 (*g*) of the bankruptcy act, in this, to wit, that the said order allowed, and refused to disallow and to expunge, the claim of the New York County national bank, a creditor of the above mentioned bankrupts, without requiring it to surrender to the trustee a certain preference received by it, to wit, the sum of six thousand two hundred and nine and $\frac{25}{100}$ dollars ($6,209.25), received from the bankrupts at a time when they were insolvent, and appropriated and applied by the said New York County national bank in partial extinction of a debt owing to it from the said bankrupts, and the said Albert P. Massey, as trustee of the above mentioned bankrupts, prays that the said order may be reversed, and that the claim of the said New York County national bank may be disallowed and expunged, unless it shall surrender to the said trustee the aforesaid sum, within a time to be fixed by the court.

HILL, STURCKE & ANDREWS,
Attorneys for Albert P. Massey, as Trustee for the Above-named Bankrupts, No. 52 William Street, New York, N. Y.

(Endorsed:) Filed Dec. 4, 1901.

19 UNITED STATES OF AMERICA,
Southern District of New York.

In the Matter of FREDERICK H. STEGE and GEORGE H. STEGE, Bankrupts. No. 2106. In Bankruptcy.

I, Thomas Alexander, clerk of the district court of the United States of America for the southern district of New York, do hereby certify that the foregoing is a correct transcript of the record of the district court in the above entitled cause.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this 11th day of February, in the year of our Lord one thousand nine hundred and two and of the Independence of the said United States the one hundred and twenty-sixth.

[SEAL.] THOS. ALEXANDER, *Clerk.*

20 United States Circuit Court of Appeals for the Second Circuit, October Term, 1901.

No. 142.

Submitted March 14, 1902; decided May 13, 1902.

In the Matter of GEORGE H. STEGE and FREDERICK H. STEGE, Bankrupts; ALBERT P. MASSEY, as Trustee, Appellant.

Appeal from the district court of the United States for the southern district of New York.

Before Judges Wallace, Lacombe, and Townsend.

This cause comes here upon appeal from an order of the district court, southern district of New York, which affirmed an order of the referee allowing the claim of the New York County national bank. The contention of the trustee is that the bank has received a preference and therefore should not be allowed to prove its claim for the balance, unless it first surrender the alleged preference.

Per Curiam.—The firm of Stege Brothers filed a petition in bankruptcy and were adjudicated bankrupts on January 27, 1900, at which time the New York County national bank held their four notes for $10,000 each, due, two of them on January 26, and two on February 8th.

Within four days of the bankruptcy the firm made deposits in their account with the bank aggregating $6,225.25, of which
21 $6,209.25 remained on the day of the adjudication. The bank claimed $40,000 less this amount on deposit and a small rebate of interest on the unmatured notes. The bankrupt act (section 57 *g.*) provides that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences;" and it is contended that if the bank be allowed thus to appropriate these deposits the result will be that it will obtain a greater percentage of its debt than any other creditors of the same class, and to that extent will have been given a preference. Manifestly the bank would thus receive a greater percentage and if the deposits be "transfers of the bankrupt's property" within the meaning of section 60 the contention is a sound one. It is no doubt true as the appellees contend that a deposit in a bank creates the relation of debtor and creditor, and that, under section 68, in all cases of mutual debts or mutual credits one debt shall be set off against another, but these propositions are immaterial, if the facts show that the bankrupts, being insolvent, have made a transfer to the particular creditor which will secure him a preference. In such a case the positive and explicit provisions of section 57 *g.* are controlling and the preferred creditor must surrender his preference if he wishes to have his claim allowed. There is no dispute that the bankrupts were insolvent when they made these deposits, they made up a statement, which they gave to the bank on January 23, and

which showed that on the day before their assets were $19,095.67 and their liabilities $65,864.10. That the intent or purpose of the transfer contemplated by section 60 is immaterial was established in *Pirie v. Chicago Title and Trust Co.* (182 *U. S.* 438) and the same case held that money was property within the meaning of the section. The only question then is whether the delivery to a bank of coin, legal tender notes, bank bills, endorsed cheques, and drafts to be passed to the credit of the depositor, according to the usual custom of banks of deposit and to be subject to the depositor's draft is "a transfer of any of his property."

22 This might be a fairly arguable question were it not for the drastic provisions of section 1 (25) which provides that, when used in the bankrupt act, the word "'transfer' shall include the sale and every other and different mode of disposing of or parting with property, *or the possession of property*, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." Of this section the Supreme Court in the Pirie case (*supra*) said "transfer is deined to be not only the sale of property, but every other and different mode of disposing of or parting with property. All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense and is intended to include every means and manner by which property can pass from the ownership and possession of another (ownership "*or* possession" is the language of the statute), and by which the result forbidden by the statute may be accomplished—'a preference enabling a creditor to obtain a greater percentage of his debt than any other creditors of the same class.'" It is true, as contended in the brief of appellee that the Supreme Court did not have before it a case on all fours with the one at bar, that in the Pirie case there was a transfer of property *and* its possession; but nevertheless that case is authority for the proposition that the section should be broadly construed so as to secure equal distribution, among all, of the property of the bankrupt.

It is contended that the last eight words of section 1 (25) viz: "as a payment, pledge, mortgage, gift, or security" are to be taken as qualifying the rest of the paragraph so that no sale or other or different mode of disposing of or parting with property or its possession can be held to be a transfer unless it be a payment, a pledge, a mortgage, a gift, or a security. This seems to us a strained construction in view of the very broad and comprehensive language used in the main clause of the paragraph; and we are inclined to hold that the words "as a payment, pledge, etc.," are illustrative only and not qualifying. Such interpretation certainly is most in accord with the rule adopted in the Pirie case. We find no

23 case strictly in point, except *In re Kellar* (110 *F. R.* 348), where the court held that a deposit by an insolvent was within the terms of section 60.

The order of the district court is reversed.

Louis Sturcke, for the appellant.
Latham G. Reed, opposed.

24 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of FREDERICK H. STEGE and GEORGE H. STEGE, Bankrupts.

Proposed Finding of Fact and Conclusions of Law.

This cause coming here upon appeal from an order of the district court for the southern district of New York, which affirmed an order of a referee allowing a claim of the New York County national bank against the contention of a trustee in bankruptcy, that the said creditor had received a preference from the bankrupts and should not be allowed to prove its claim unless and until it first surrender the alleged preference, and this court having reversed the order appealed from, and the said creditor, the New York County national bank, desiring and intending to appeal to the supreme court from our said decision reversing the said order,

Now, therefore, we make the following

Finding of Fact.

For a number of years past the bankrupts, George H. Stege and Frederick H. Stege, were engaged, in the city and county of
25 New York, in the business of dealing in butter, eggs, etc., at wholesale under the firm name and style of Stege and Brother. On January 27, 1900, they filed a voluntary petition of bankruptcy in the district court with liabilities of $67,232.49 and assets of $20,729.66, and upon the same day were duly adjudicated bankrupts. Among their liabilities there was an indebtedness of $40,000 to the New York County national bank for money loaned upon four promissory notes for $10,000 each. The money was loaned to the bankrupts and the notes were originally given as follows:

April 26, 1899, $10,000, 6 months, due October 26, 1899.
April 26, 1899, $10,000, 7 months, due November 26, 1899.
June 26, 1899, $10,000, 4 months, due October 26, 1899.
August 2, 1899, $10,000, 4 months, due December 2, 1899.

None of these notes were paid when they fell due, but all were renewed as follows:

October 26, 1899, $10,000, 3 months, due January 26, 1900.
November 26, 1899, $10,000, 75 days, due February 9, 1900.
October 26, 1899, $10,000, 3 months, due January 26, 1900.
December 2, 1899, $10,000, 69 days, due February 9, 1900.

On January 23, 1900, in the morning, the bankrupts went to the New York County national bank and asked the officers to have the two notes of $10,000 each, which fell due on January 26th,
26 extended. The bankrupts at that time informed the bank officers that they were unable to pay the notes then about to fall due. In the afternoon of the same day, January 23, 1900, the bankrupts again called upon the bank officers, and at that time they

delivered to them a statement of their assets and liabilities, which statement was not delivered until after the deposit of $3,884.47 had been made on that day. This statement as of January 22, 1900, showed their assets to be $19,095.67, and their liabilities $65,864.61.

The bankrupts kept their bank account in the New York County national bank since May 6, 1899. On January 22, 1900, their balance in the bank was $218.50. On the same day they deposited in that account $536.83; on January 23, 1900, $3,884.47; on January 25, 1900, $1,803.95, making a total of $6,225.25 deposited in the three days mentioned. Of this amount there was left in the bank account on the day of the adjudication in bankruptcy, January 27, 1900, the sum of $6,209.25, the bank having honored a check of Stege Bros. after the date of all these deposits.

At the first meeting of creditors, February 9, 1900, the New York County national bank filed its claim for $33,790.25.

In its proof of claim the bank credited upon one of the notes which became due on January 26, 1900, the deposit of $6,209.25. The claim was allowed by the referee in the sum of $33,750.25, being $40,000 less the amount on deposit in the bank ($6,209.25), and a small rebate of interest on the unmatured notes. Some
27 of the creditors at this meeting reserved the right to move to reconsider the claim of the New York County national bank; the referee granted this request. Afterwards the trustee, as the representative of the creditors, moved before the referee to disallow and to expunge from his list of claims the claim of the New York County national bank unless it surrender the amount of the deposit, namely: $6,209.25, which had been credited by the bank upon one of the notes. The referee denied that motion, and an appropriate order was made and entered. The trustee thereupon duly filed his petition to have the question certified to the district judge. The district judge on the 25th day of November, 1901, made an order affirming the order of the referee. From that order an appeal was duly taken by the trustee to the circuit court of appeals. The deposits were made in the usual course of business; at the time they were made Stege Brothers were insolvent. And we find as

Conclusions of Law.

I.

The making of the said deposits constituted transfers of the bankrupts' property to the bank.

28

II.

The effect of the enforcement of such transfer, by the bank's retention of the same or a payment on account of its claim against the bankrupts will be to enable the bank to obtain a greater percentage of the debt due to it, than other creditors of the same class.

III.

That the appeal should be allowed and the order of the district court and of the referee refusing to strike out and expunge the bank's claim unless and until the said creditor should pay to the trustee the amount of the said deposits, to wit, the said sum of six thousand two hundred and nine and 25/100 dollars ($6,209.25) should be reversed and the matter remanded to the district court to proceed in conformity with the order of reversal to be entered upon these findings.

WM. J. WALLACE.
E. H. LACOMBE.

29 [Endorsed:] United States court of appeals for the second circuit. In the matter of Frederick H. Stege and George H. Stege, bankrupts. Finding of fact and conclusion of law. Hill, Stürcke & Andrews, attorneys for trustee, 37 Liberty street, New York city. Borough of Manhattan. United States circuit court of appeals, second circuit. Filed Jun- 11, 1902. William Parkin, clerk.

30 At a stated term of the United States circuit court of appeals, in and for the second circuit, held at the court rooms in the post office building, in the city and county of New York, on the 11th day of June, A. D. 1902.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. William K. Townsend, circuit judges.

In the Matter of GEORGE H. STEGE and FREDERICK H. STEGE, Bankrupts.

Appeal from the district court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of record from the district court of the United States for the southern district of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of the said district court be and hereby is reversed, with costs; it is further

Ordered that the appellee herein, The New York County National Bank have ten days from and after the entry of this order to surrender to the appellant herein, the trustees, the sum of $6,209.25 together with interest thereon at the rate of six per centum per annum from the 8th day of March, 1900, and in case of its failure to surrender as aforesaid, it is ordered that the claim of the appellee shall be expunged from the records of the trustee, and that the appellee shall pay back to the appellant all dividends heretofore received by it on account of its claim, with interest thereon at
31 the rate of six per centum per annum from the date of payment thereof; and it is further

Ordered that if the appellee shall elect to surrender as aforesaid, it shall also be charged with the costs and disbursements paid or incurred by the appellant on account of and in connection with the determination of the questions involved in this appeal, the amount and propriety of all such items to be determined by the district judge or by the referee, as the district judge may order.

It is further ordered that a mandate issue to the said district court in accordance with this decree.

W. J. W.
E. H. L.

Endorsed: United States circuit court of appeals, second circuit. In the matter of George H. Stege and Frederick H. Stege bankrupts. Order for mandate. Hill Sturcke & Andrews, 27 Liberty street, borough of Manhattan, New York city. To Bowers & Sands, Esqs., attorneys for appellee. Service of a copy of the within is hereby admitted. Dated May 24, 1902. Bowers & Sands, attorneys for appellee. United States circuit court of appeals, second circuit. Filed Jun- 11, 1902. William Parkin, clerk.

32 In the Circuit Court of Appeals of the United States for the Second Circuit.

In the Matter of GEORGE H. STEGE and FREDERICK H. STEGE, Bankrupts.

To the honorable the Supreme Court of the United States:

The appeal of the New York County national bank, a creditor of the bankrupts above named, respectfully showeth:

That upon the 27th day of January, 1900, the firm of Stege Brothers, the bankrupts above named, filed a petition in bankruptcy and were adjudicated bankrupts, at which time the New York County national bank held their four notes of ten thousand dollars each, two of which became due on the 26th day of January, 1900, and the other two on February 8th, 1900.

That the said bankrupts had kept their account in the New York County national bank, the petitioning creditor, ever since the 6th day of May, 1899, which account was the ordinary and usual deposit account kept between banker and depositor.

That the amount due the said Stege Brothers by the bank on the deposit account aforesaid, on the said 26th day of January,
33 1900, was the sum of six thousand two hundred and nine and 25/100 dollars ($6,209.25).

That shortly after the adjudication of bankruptcy aforesaid, the said New York County national bank prepared and filed its proof of claim with the trustee in bankruptcy herein, wherein it claimed from the estate of the said bankrupts the sum of thirty-three thousand seven hundred and ninety and 25/100 dollars ($33,790.25), being the amount due upon the notes aforesaid, less the amount remaining to the credit of the said bankrupts on their deposit account,

and the referee in bankruptcy allowed the said claim in the sum of thirty-three thousand seven hundred and fifty and 25/100 dollars ($33,750.25), being the forty thousand dollars ($40,000) due upon the notes aforesaid, less the amount on deposit in the bank to the credit of Stege Brothers as aforesaid, and a small rebate of interest on the unmatured notes.

Your petitioner further shows that under leave reserved, the said trustee in bankruptcy thereafter moved the referee that the claim of the New York County national bank be expunged and thrown out, unless it should pay to the said trustee the said sum of six thousand two hundred and nine and 25/100 dollars ($6,209.25) due on the deposit account, the said application being made on the ground that the deposits of various items making up said total of six thousand two hundred and nine and 25/100 dollars ($6,209.25) constituted a preference, whereby the said New York County national bank was enabled to receive a greater amount of its debt than other
34 creditors of the same class. The said referee, however, refused to make the order requested by the said trustee, and held that the said notes and the said deposit account constitute mutual debts and mutual credits between the said New York County national bank and the said bankrupts, and that the same shall be set off one against the other, and that the New York County national bank had properly filed its proof of claim for the balance only, and that the same was properly allowed and should be paid.

Thereafter the said trustee, feeling aggrieved by the said action of the referee, procured the said referee to certify the said question and evidence bearing thereon to the district court in the southern district of New York, and the matter coming on to be heard before him, he affirmed the ruling of the said referee, and the trustee still deeming himself aggrieved, appealed from the said order of the district court to the circuit court of appeals for the second circuit, and the said appeal duly coming on to be heard, the said circuit court of appeals for the second circuit reversed the said order of the district court, holding that the making of the deposits which constituted the amount of the deposit account of the said Stege Brothers in the New York County national bank constituted preferences and that the claim of the New York County national bank should be expunged, unless it should, within the time limited, pay to the said trustee the amount of the said deposits, with interest,
35 and thereafter, and on or about the 11th. day of June, 1902, an order was duly entered and filed by the said circuit court of appeals and findings of fact and conclusions of law were at the same time filed by the said court reversing the order of the district court and the ruling of the referee as aforesaid.

That as the appellant, The New York County National Bank, is informed and believes, in the proceedings above recited, errors have been committed by the learned circuit court of appeals in directing that the said claim of your petitioning creditor should be expunged unless the said petitioner should pay to the trustee the said sum of six thousand two hundred and nine and $\frac{25}{100}$ dollars ($6,209.25),

with interest as directed by the order entered upon the decision of the circuit court of appeals; by reason of all which your petitioner has sustained grievous loss.

Wherefore, this appellant appeals from the whole of the said order of reversal of the circuit court of appeals for the second circuit, dated the 11th day of June, 1902, and respectfully prays that the said order and decree and the said findings and pleadings may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said case, and that the said order or decree of the circuit court of appeals for the second circuit, and every part thereof, may be reversed and a decree made sustaining the claim of the said New York County National Bank as
36 filed and as allowed by the referee, all as aforesaid, and that your petitioner may have such other and further relief in the premises as may be just.

Dated, New York, June 20th, 1902.

BOWERS & SANDS,
Solicitors and Counsellors for Appellant, New York County National Bank, 31 Nassau Street, Borough of Manhattan, New York City, N. Y.

37 [Endorsed:] In the circuit court of appeals, of the United States, for the second circuit. In the matter of George H. Stege and Frederick H. Stege, bankrupts. Petition of appeal. Bowers & Sands, solicitors & counsellors for the appellant, New York County National Bank, 31 Nassau street, borough of Manhattan, New York city, N. Y. Within appeal allowed. E. Henry Lacombe. June 24th 1902. United States circuit court of appeals second circuit. Filed Jul- 8, 1902. William Parkin, clerk.

Service of a copy hereof on July 8, 1902 is admitted.
HILL, STURCKE & ANDREWS,
Attorneys for Trustee.

38 In the United States Circuit Court of Appeals for the Second Circuit.

In the Matter of FREDERICK H. STEGE and GEORGE H. STEGE, Bankrupts.

Comes The New York County National Bank, a creditor of the bankrupts above named, and the appellant herein, and says, that in the order of this court reversing the order of the district court herein and directing that the claim of the above named creditor against the bankrupts should be struck out, unless within the time therein limited the said creditor should pay to the trustee in bankruptcy herein the sum of six thousand two hundred and nine and 25/100 dollars ($6,209.25), and interest, and that unless the said creditor should pay the said sum as aforesaid within the time limited in said order, it should pay back to the trustee in bankruptcy all divi-

dends heretofore received herein, with interest, there is manifest error therein and in the findings of fact and conclusions of law herein, for that the said court finds that the deposits made by the said bankrupts in the aforesaid New York County national bank were and constituted preferences, and for that the said court did not find that the notes held by the said New York County national
39 bank against the bankrupts and the claim of the bankrupts against the said bank on their deposit accounts were mutual debts and mutual credits, and for that it did not find that the same should be set off one against the other, and for that this court did allow not permit the same to be set off one against the other.

And the said appellant prays that the order aforesaid may be reversed, annulled and altogether held for naught, and that it may be restored to all things which it has lost by reason of the said order.

BOWERS & SANDS,
Attorneys for Appellant, 31 Nassau Street,
Borough of Manhattan, New York City, N. Y.

40 [Endorsed:] United States circuit court of appeals. Second circuit. In the matter of Frederick H. Stege and George H. Stege, bankrupts. Assignment of errors. Bowers & Sands, attorneys for appellant, 31 Nassau street, borough of Manhattan, New York city, N. Y. United States circuit court of appeals second circuit. Filed July 8, 1902. William Parkin, clerk.

Service of a copy hereof on July 8, 1902 is admitted.

HILL, STURCKE & ANDREWS,
Attorneys for Trustee.

41 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of FREDERICK H. STEGE and GEORGE H. STEGE, Bankrupts.

The above named court having by its order duly made and entered in the above entitled proceeding on the 11th day of June, 1902, reversed the order of the district court herein and having directed the said creditor within ten days to pay back to the trustee in bankruptcy of the above named bankrupts the sum of six thousand, two hundred and nine and 25/100 ($6209.25) dollars, together with interest thereon at the rate of six per cent. per annum from March 8th, 1900, or in case of the failure so to pay that the said creditor shall pay back to the said trustee all dividends heretofore received by the said New York County national bank on account of its claim, with interest at the rate of six per cent. per annum from the date of payment thereof.

And the said New York County National Bank desiring to appeal to the Supreme Court of the United States from the said order of reversal,

Now then these presents do witness, that the Lawyers' Surety Company of New York is held and firmly bound unto Albert
42 P. Massey, as trustee in bankruptcy of the above named bankrupts, in the sum of eighty-five hundred ($8500.00) dollars, to be paid to the said trustee, for the payment of which well and truly to be made, the said Lawyers' Surety Company of New York binds itself and its successors and assigns firmly by these presents.

Signed, sealed and dated the 20th. day of June, in the year of our Lord, one thousand nine hundred and two.

Whereas the above named New York County National Bank hath prosecuted an appeal to the Supreme Court of the United States to reverse the order of the circuit court of appeals for the second circuit in the above entitled proceeding and desires also a stay of proceedings under the said order,

Now, therefore, the condition of this obligation is such that if the above named appellant shall prosecute the said appeal to effect and answer all damages and costs in the district court, the circuit court of appeals, and in the Supreme Court, if it shall fail to make its appeal good; and if the said order shall be affirmed, or, if the said appeal shall be dismissed, and the New York County National Bank shall within ten days after the service of a copy of the mandate of the Supreme Court, pay to the said trustee the sum of six thousand two hundred and nine and 25/100 ($6209.25) dollars, together
43 with interest thereon at the rate of six per cent. per annum from March 8th. 1900; or, in case of failure so to pay, shall pay back to the said trustee all dividends heretofore received by the said New York County National Bank on account of its claims with interest at the rate of six per cent. per annum from the date of payment thereof, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE LAWYERS' SURETY COMPANY
OF NEW YORK,
[SEAL.] By BENJ. E. HALL, *Vice President.*
Attest: LOUIS E. KUSTER, *Secretary.*

Sealed and delivered and taken and acknowledged this 20th. day of June, 1902, before me Henry G. Hinton a notary public.

H. G. HINTON,
[SEAL.] *Notary Public, Kings County, N. Y.*

Certificate filed in N. Y. Co.

44 STATE OF NEW YORK, }
County of New York, } *ss:*

On the 20th day of June in the year 1902, before me personally came Benj. E. Hall to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he is the vice president of the Lawyers' Surety Company of New York, the corporation described in and which executed the above

instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, chapter 720 of the New York Session Laws of 1893.

H. G. HINTON,
Notary Public, Kings County, N. Y.

Certificate filed in N. Y. Co.

At a stated meeting of the board of directors of the Lawyers' Surety Company of New York, held at the office of the company, Nos. 32, 34 and 36 Liberty street, in said city, on the 21st day of April, 1897, on motion, it was unanimously

"Resolved, That the president, the vice president, the acting "president or the second vice-president be, and either of them is, "hereby authorized and empowered to sign, execute and deliver any "and all bonds or undertakings for or on behalf of the company, and "to attach thereto the seal of the corporation, the same to be attested "by the secretary or the acting secretary."

COUNTY OF NEW YORK, *ss:*

I, Louis E. Kuster secretary of the Lawyers' Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a true and correct transcript therefrom, and of the whole of said original resolution.

Given under my hand, and the seal of the company at the city of New York, this 20th day of June 1902.

[SEAL.] LOUIS E. KUSTER, *Secretary.*

45 [Endorsed:] United States circuit court of appeals, for the second circuit. In the matter of Frederick H. Stege and George H. Stege, bankrupts. Bond on appeal. Bowers & Sands, solicitors for appellant, New York County National Bank, 31 Nassau street, borough of Manhattan, New York city, N. Y. Satisfactory as to form and sufficiency of sureties Hill Stur-ke — Andrews attorneys for trustee June 20, 1902. E. H. Lacombe U. S. C. J. United States circuit court of appeals, second circuit. Filed Jul- 8, 1902.

Service of a copy hereof is admitted July 8th 1902
HILL, STURCKE & ANDREWS,
Attorneys for Trustee.

46 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 45 inclusive, contain a true and com-

plete transcript of the record and proceedings had in said court, in the case of In the matter of Frederick H. Stege & ano. bankrupts as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 14th day of July in the year of our Lord one thousand nine hundred and two and of the Independence of the said United States the one hundred and twenty-seventh.

[SEAL.]

WM. PARKIN, *Clerk.*

47 In the Circuit Court of Appeals of the United States for the Second Circuit.

In the Matter of GEORGE H. STEGE and FREDERICK H. STEGE, Bankrupts.

UNITED STATES OF AMERICA, *ss:*

To Albert P. Massey, trustee in bankruptcy of George H. Stege and Frederick H. Stege:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 21st day of July, 1902, pursuant to a petition of appeal filed in the office of the clerk of the United States circuit court of appeals for the second circuit, wherein The New York County National Bank, is appellant, and you are appellee, to show cause, if any there be, why the order or decree of the said circuit court of appeals herein and mentioned in the said petition should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated, June 25 1902.

E. H. LACOMBE,
U. S. Circuit Judge.

48 [Endorsed:] In the circuit court of appeals of the United States, for the second circuit. In the matter of George H. Stege and Frederick H. Stege, bankrupts. Citation. Bowers & Sands, solicitors & counsellors for the appellant, New York County National Bank, 31 Nassau street, borough of Manhattan, New York city, N. Y. United States circuit court of appeals, second circuit. Filed Jul- 8 1902 William Parkin, clerk.

Service of a copy hereof is admitted July 8th 1902.

HILL, STÜRCKE & ANDREWS,
Attorneys for Trustee.

Endorsed on cover: File No. 18,611. U. S. C. C. of appeals, 2nd circuit. Term No. 90. The New York County National Bank, appellant, *vs.* Albert P. Massey, trustee in bankruptcy of George H. Stege and Frederick H. Stege. Filed July 21", 1902.

FILE COPY. 9407

Office Supreme Court U. S.
FILED
NOV 25 1903
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States,

THE NEW YORK COUNTY NATIONAL BANK,
Appellant,

against

ALBERT P. MASSEY, Trustee in Bankruptcy of GEORGE H. STEGE and FREDERICK H. STEGE,
Respondent.

90.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

Statement.

This appeal (fol. 32) is from a judgment or order (fol. 30) of the Circuit Court of Appeals for the Second Circuit, reversing, upon application of the Trustee in bankruptcy (fol. 18), an order of the District Court (fol. 14) which affirmed a ruling of the Referee (fol. 5) which refused the application of the Trustee to strike out and reject the claim of the New York County National Bank for $33,750.25 (fol. 10), filed against the bankrupts' estate, unless the said Bank should pay over to the Trustee certain sums of money ($6,209.25) alleged to have been received by the Bank from Stege Bros., the bankrupts, as prohibited transfers or preferences. These sums were deposits in the N. Y. County National Bank to the credit of the bankrupts' deposit account.

As stated, the matter went to the Circuit Court of Appeals upon the Trustee's appeal. That Court,

in reversing the District Court, made findings (fol. 24) of fact and conclusions of law as required by the Rules in Bankruptcy, and also wrote an opinion in the matter (fol. 20).

The matter came before the District Court upon the certificate of the Referee (fol. 8), who certified the facts of the case upon which he based his conclusion that the Bank had not been preferred by the bankrupts.

Both the Referee, the District Court (fol. 13) and the Circuit Court of Appeals (fol. 27) expressly found that the deposits were made in the ordinary course of business.

The firm of Stege Brothers filed a petition in bankruptcy and were adjudged bankrupts on the 27th day of January, 1900 (fol. 20), at which time the New York County National Bank held their notes aggregating the sum of $40,000 (fol. 9), and payable as follows:

One note for	$10,000,	due	January	26,	1900.		
"	"	"	"	"	"	"	"
"	"	"	"	"	February	8,	"
"	"	"	"	"	"	"	"

The bankrupts for some time past had been customers of the New York County National Bank, with which they kept the ordinary so-called "depositor's account" (fol. 10).

On the 26th day of January, 1900, the date upon which two of the notes became due, the bankrupts had a balance to their deposit account amounting to the sum of $6,209.75 (10). The certificate showed that the bankrupts were accustomed to make daily or almost daily deposits in the bank, the last deposits being made on January 23d for the sum of $3,884.47, and on January 25th for the sum of $1,803.95. The New York County National Bank filed its proof of claim, deducting the amount of the deposit to the bankrupts' credit ($6,209.75) from the amount of one of the notes which became

due on the 26th day of January, and claiming the balance, $33,790.25 (10). Some creditors of the bankrupts allege that the bank received a preference, and unless the same is given up its claim as presented cannot be allowed (10).

The Referee overruled this claim of the creditors (10, 12).

The case was brought on by the Trustee in the District Court and in the Circuit Court of Appeals upon that certificate alone, without any testimony This certification of his findings and the findings themselves are as binding as are the findings of fact of any referee or single judge or the verdict of a jury, unless manifestly unquestionably erroneous.

In re Carver, 113 Fed., 138.
In re Stout, 109 Fed., 794.
In re Covington, 110 Fed., 143.
Railway Co. *vs.* Gordon, 151 U. S., 285.

A finding of fact dependent upon conflicting testimony by a judge, or master or referee, who sees and hears the witnesses testify, has every reasonable presumption in its favor, and may not be set aside and modified unless it clearly appears that there was an error or mistake upon his part.

Tilghman *vs.* Proctor, 125 U. S., p. 149.
Callaghan *vs.* Myers, 128 U. S., 666.
Chauncey *vs.* Dyke Bros., 9 Am. B. Rep., 470.

The Referee has found that a number of notes were made by the bankrupts upon which the bank loaned them $40,000, the said notes being made at various times between April 26th and August 2, 1899. The last of these notes fell due on December 2, 1899, and were then renewed for various periods, the first one thereafter falling due on January 26, 1900 (9).

Against the deposits checks were drawn, and the

last check drawn and honored was on the 25th of January (10).

On the 26th of January, therefore, the first of these notes for $10,000 became due, was not paid and the bankrupts were indebted to the bank in the sum of $10,000 and interest, and the bank was indebted upon general balance of the deposit account to the bankrupts in the sum of $6,209.25.

On the 27th Stege Brothers were adjudicated bankrupts.

Under the statute the bank filed its claim, the only way under the law it could file it, for the balance due from Stege Brothers on the $40,000 notes, after crediting, as it was bound to do, and setting off against the same the sum of $6,209.25.

SPECIFICATION OF ERROR.

It was error to hold that the deposit in the ordinary course of business was a prohibited transfer; and that the effect of the deposit worked a preference.

The motion was founded upon the proposition that Stege Brothers when they made the deposits on the 22d, 23d and 25th of January, really made a *preference* in favor of the County Bank to the amount of such deposit; in other words, did not make a "deposit" with its attendant legal relations, but made a *payment* with the object of reducing their indebtedness to the bank on the note about to become due.

The Referee and the Court of Appeals have found (11) *that the deposits were made in the ordinary course of business and drawn upon in the ordinary course of business.* This is a material fact; is the crucial fact.

The deposit of $3,884.47 was made before any

statement of the Stege Brothers' financial condition was made to the bank (9).

It is of course true that on the 22nd of January, and doubtless for a long time previous, Stege Brothers were insolvent; but the bank had no knowledge of their *insolvency* until after the rendering of this statement on the afternoon of January 23rd. Insolvency under the Act of 1898 is not the same as insolvency under the Act of 1867 (see definitions in Sec. 1 of the Act and also the opinion in the Pirie case, 182 U. S.).

But knowledge or no knowledge is beside the question. We do not dispute that if the "deposit" was given and received as a payment as a matter of fact, we have nothing to complain of. Nor do we dispute that if, as a matter of law, all deposits made in the ordinary course of business within the four months are prohibited transfers, we have nothing to complain of.

It may well be that the intention to prefer is not necessary if a *prohibited transfer* is made; we shall not contest it; we submit it is not involved here, but we do contend that in discovering what the transaction was which took place, what legal relations sprang from putting the money through the receiving teller's window and the accompanying book entries, there, we contend, the intention is vital. If such intention was to reduce the debt to the bank, then we have no reason to appeal this case. If, as has been found by the Referee, the intention was to make a deposit in the ordinary course of business, then there was no transfer, no parting with property, *no lessening the estate of the bankrupts*, but merely an alteration in the form of part of Stege Brothers' property from checks to their order (choses in action) to a debt from a solvent bank (another chose in action). The preference, (and every set-off involves a preference,) was worked by the bankruptcy act; it compels it, it commands it, it compels the creditor to demand his preference in the very first step he takes,

i. e., his proof of claim; he must prove the balance of his debt only, and that only must be and can be allowed by the terms of the act.

All the deposits were made before any of the outstanding notes became due (9, 10).

The New York County National Bank insists that it filed a proper proof of claim; that the gross indebtedness of Stege Bros. on the notes, and of the County Bank on the deposit account were mutual debts and credits which it was not only entitled under the statute to set-off, but was bound to set-off, and to prove for the balance only.

Furthermore, the County Bank claims that it had a banker's lien upon the deposits, which it was entitled to apply upon any indebtedness actually due by the depositors, and that this lien arose by operation of law out of an implied contract made at the time of opening the deposit account with the bank; that if the depositors should at any time become indebted to the bank, it should have the right to apply any balance of account on such indebtedness.

The Referee supported these propositions of the County Bank, and hence refused to grant the motion made before him by the trustee, and his certificate shows his grounds and reasons for such action.

POINT I.

A set-off necessarily involves a preference.

The Bankruptcy Act enjoins and commands preferences in certain cases, of which this is one. Every set-off involves necessarily a preference. It necessarily involves the payment of the whole or some part of the debt in full. It involves the ap-

plication of a part of the bankrupt's assets *in solido* to the payment of the whole or part of a particular debt. Not only does the Bankruptcy Act command a preference to be given, by the rule of set-off, but the creditor may also get his ordinary dividend *pari passu* with the other creditors upon the balance of his claim.

A owes B $100 and B owes A $50 and the statute commands that upon the bankruptcy of A the debts shall be set-off and that B shall prove for the balance only. A also owes C $100.

B sets-off the amount of his indebtedness to A reducing the claim to $50; he is thus paid one-half of each dollar of his claim in full, and assuming that A's estate will pay generally 50% on all claims, B will get $25 more, whereas, all that C will get is $50 on account of this claim; therefore, every set-off works a preference.

Therefore, if in distributing a bankrupt's estate under the provisions of the Bankruptcy Act it turns out that B has received a greater percentage of his debt than any other creditor of the same class, it surely is of the utmost importance to inquire whether the effect is obtained by carrying out the commands of the Bankruptcy Act itself, or whether the result was the direct act of the bankrupt.

And in the case at bar the broad question which is presented to the Court is, is it possible or impossible for the customer of a bank, who is liable to the bank on loans, to keep a deposit account with that bank and to make *deposits* with that bank while such loans are outstanding; or must every such deposit, though made in the usual and and ordinary course of business, be treated in a Court of Bankruptcy a payment made within four months? Does the act make truth untrue, if bankruptcy ensues in four months?

The learned Referee, having held that the deposit being made in the ordinary course of business was thus made without reference to the bank's claim,

and having kept the two relations in which Stege Brothers and the Bank stood to each other separate as debtor and creditor each to the other, unless such separation is a legal impossibility, we respectfully submit the learned Referee was absolutely right in his ultimate decision of the matter.

The learned District Judge upon the certificate of the Referee took the same view, that the deposit being *made in the ordinary course of business and in the relationship of debtor and creditor*, were not preferences; they certainly were not payments made by the bankrupts or received by the bank as payments on account of its notes. Such separation of the legal relations of the parties being found as matter of fact the learned District Judge necessarily and logically found that any preference that was eventually worked in favor of the bank resulted from the application of the provisions of the Bankruptcy Act itself.

Upon appeal to the Circuit Court of Appeals that learned Court, in reversing the rulings below, found also that the deposits were made in the ordinary and usual course of business.

(See findings of fact, fol. 27) and indeed they could not have done otherwise; and they merely say that it was immaterial whether as a consequence of such deposits, made in the usual course of business, the relation of debtor and creditor arose between the bank and the bankrupts as to the amount of these deposits. That learned Court said, fol. 21:

> "These propositions are immaterial if the facts show that the bankrupts being insolvent have made a transfer to a particular creditor, which will secure him a preference".

They admit it is true, as the bank contended, that under Section 68 in all cases of mutual debts and mutual credits, one debt shall be set off against another. This truth was also said to be immaterial. In other words, the learned Circuit Court of Appeals was so impressed with the notion that a dis-

tribution of a bankrupt's estate ought to result in an absolute equality amongst creditors, that it declared in so many words that the provisions of Section 68 of the Bankruptcy Act commanding the set off of one debt against another were immaterial.

That Court said:

> "In such a case the positive and explicit provisions of Section 57 G are controlling, and a preferred creditor must surrender his preference if he wishes to have his claim allowed".

There is here apparent a *petitio principii*, and an assumption directly in the face of the Court's own finding that the *deposits* were made in the ordinary course of business.

POINT II.

The relation of the bankrupts with the bank was that of mutual debtors and creditors.

That the relation of a depositor in a bank with the bank itself is that of debtor and creditor is a proposition which has long been decided. The leading case upon this question is Bank of the Republic *vs.* Millard, 10 Wall., 152, which has been constantly cited as an authority. Judge Davis, writing the opinion of the Court, said:

> "It is no longer an open question in this Court since the decision in the cases of the Marine Bank *vs.* The Fulton Bank, 2 Wall., 252, and Thompson *vs.* Riggs, 5 *Id.*, 663, that the relation of banker and customer in their pecuniary dealings is that of debtor and creditor. It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to

the contrary, they belong to the bank, become part of its general funds and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall, from time to time, draw on him. The contract between the parties is purely a legal one and has nothing in the nature of a trust in it. This subject was fully discussed in the case of Foley *vs.* Hill, and all the Judges concurred in the opinion that the relation between a banker and customer who pays money into the bank or to whose credit money is placed there, is the ordinary relation of debtor and creditor and does not partake of a fiduciary character, and the great weight of American authority is to the same effect."

In the case of Davis *vs.* Elmira Savings Bank, 161 U. S., at page 288, Mr. Justice WHITE says:

"The deposit of money by a customer with his banker is one of loan with the superadded obligation that the money is to be paid, when demanded by a check."

Scammon *vs.* Kimball, Assignee, 9 U. S., 369.

"Deposits undoubtedly may be made with the banker under circumstances where the legal conclusion would be that the title to the fund deposited remained in the depositor, and in that case the banker would become the bailee of the depositor and the latter might rightfully demand the identical money deposited as his property; but where the deposit is general and there is no special agreement proved inconsistent with such a theory, the title to the money deposited, whatever it may be, passes to the banker, and he becomes liable for the amount as a debt which can only be discharged by a legal payment of the amount."

Hill on Trustees, 4th Am. Ed., 173, says:

"Money deposited with a banker creates a

legal debt between the parties, whichunder proper circumstances may be recovered in an action at law."

In Scott *vs.* Armstrong, 146 U. S., 499, it was held that a depositor of a national bank who at the time of the failure of the bank is indebted to the bank on account of a note held by the bank, is entitled to have set off against his indebtedness the amount of his deposit with the bank at the time of its insolvency and dissolution.

From the foregoing decisions it can easily be seen that the relationship between the bankrupts and the bank is not to be complicated with any idea of bailment or trusteeship, or of payment or transfer, but is purely one of debtor and creditor, to which the ordinary rules of contract apply.

The relationship established is peculiar to the banking business, as stated by the Supreme Court. It is one of *loan* with the *obligation to repay* on demand, by check, which is " that kind of deposit of money peculiar to the banking business in which the depositor for his own convenience parts with the title of his money *and loans it to the banker and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount or any part thereof on demand* " (92 U. S., p. 370).

The only question, therefore, we submit, is one of fact, whether the deposits were in good faith deposits ; or " frauds," merely ostensible deposits ; really payments and accepted as such. This, the Referee, on the evidence, and the Court of Appeals has found in favor of the bank.

Therefore, they became loans, debts to the bankrupts from the bank, just as the notes were debts to the bank from the bankrupts—mutual debts and credits that arose in good faith.

Transfers made in the usual and ordinary course of a trader's business, or payments made at the time a debt matures and in the usual mode of paying debts, are *prima facie* valid.

Bank *v.* Campbell, 14 Wall., 97.
Driggs *v.* Moore, 1 Abb. C. C., 440.

If a transfer is made in the usual and ordinary course of business of the bankrupt, the burden of proof will rest upon the assignee.

Collins *v.* Bell, 3 B. R., 587.
Scammon *v.* Cole, *id.*, 393.

POINT III.

The New York County National Bank was bound to deduct the amount of the bankrupts' deposit from the face value of the notes which became due on the 26th of January, 1900, and were entitled to prove their claim for the balance of the indebtedness, and for that only.

Section 68 of the Bankruptcy Law provides as follows:

"Section 68. Set-offs and counterclaims:

(*a.*) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set-off against the other and the balance only shall be allowed and paid.

"(*b.*) A set-off or counterclaim shall not be allowed *in favor of any debtor of the bankrupt* which (1) is not provable against the estate, or (2) was purchased by or transferred *to* him after the filing of the petition or within months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent or had committed an act of bankruptcy."

None of these exceptions, however, has any application to the case at bar, because (1) the set-off or counterclaim, to wit, the notes, are provable against the estate; and (2) there is no dispute but what the

notes were taken by the bank, for value, more than four months previous to the filing of the petition and without knowledge or notice that the bankrupts were insolvent or had committed any act of bankruptcy.

Section 60 of the Bankruptcy Act is as follows.

"Sec. 60. Preferred creditors:

> (*a.*) A person shall be deemed to have given a preference if being insolvent he has * * * made a transfer of any of his property, and the effect of the * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

If the receipt of the deposits created a debt to the bankrupts, that, we submit, settles the matter. Therefore, once more the question is, did they have that effect? Were they really deposits in the ordinary course of business, as the Referee and the Court of Appeals have found? Or were they transfers of property constituting a preference? If they were deposits, loans, then they were properly offset; but the trustee argues that the deposits were made at the time as preferences to the note creditor. No doubt if these deposits were *not* really deposits giving rise to debts, but were really payment on account of the notes, then they are preferences; but if they merely raise a debt; were as much an asset of the bankrupt after the deposit as before; if they did not deplete the bankrupt's estate; if they no more were a parting with property than they were the cause of the acquisition of property (Sawyer *vs.* Turpin, 91 U. S., pp. 120-121); if by parting with one hundred dollars in bills the bankrupt gets a horse or gets a good note or obligation; or gets a good promise or agreement to pay on demand by check; then the bankrupt merely changes the form of his one hundred dollar asset or property, and the person or bank to whom the transfer is made does not, as the "*effect*" *of it*,

"obtain a greater percentage of his debt" than other creditors. *The creditor obtained nothing whatever by the "transfer", except the use of the money and the burden of repaying it.* Whether, if a note is *due* and a deposit is made which in effect gets no equivalent asset, but goes immediately in reduction of the note, such a deposit is a prohibited transfer, it is not necessary to consider; for that is not this case.

Every transfer is not prohibited by Section 60*a*. Transfers are not as such prohibited anywhere in the Act; nor do they have the effect of precluding a creditor from obtaining dividends upon his claim. It is only such *transfers* as amount to *prohibited preferences* that are objectionable. A transfer that does not have the effect of enabling a creditor to obtain a greater percentage is not objectionable. If a man to whom in business I owe $2,000 meets me in the street and borrows $50 in cash because he has just lost his purse, and then I fail, may he not offset? Is he not obliged to do so?

Assuming, therefore, that a deposit may be called a transfer, it does not have that effect. The only effect is to raise a debt to a depositor for an equal amount. The fact of greater or less propinquity of time of deposit to time of debt becoming due and payable, surely cannot affect the question. *E. g.*, I borrow $300 on January 1st, payable in ten days, and fail to pay; On January 2d following I deposit $100; on December 31st I deposit $100 more.

The effect of these deposits is the same, whatever that effect may be, if they are made under the same contract. They both raise the relationship of debtor and creditor, or neither of them does so; they are both preference payments on the note, or neither of them is; they must be both set-off against the $300, or neither of them can be; the bankrupt has a banker's lien upon them both when the ten days expire, or he has none upon either. Set-off, indeed, is broader than banker's lien, for set-off applies to debts *solvenda in futuro* as well as due

and payable debts; while the banker's lien is only the right to apply the balance of deposit account on actually due and payable notes.

The Bankruptcy Law itself gives and enforces the right and duty of set-off, and includes the common law right (and makes a duty of it) of banker's lien.

THE ACT CONDEMNS, NOT EVERY TRANSFER, BUT ONLY SUCH AS IT EXPRESSLY PROHIBITS; WHICH ARE ONLY SUCH AS DEPLETE OR LESSEN THE BANKRUPT'S ESTATE.

An exchange of values between an insolvent debtor and one of his creditors does not constitute a preference, because in such cases there is no diminution of the debtor's estate whereby creditors may be injured.

Cook *v.* Tullis, 18 Wall., 332.
Clark *v.* Iselin, 21 Wall., 378.
Fox *v.* Gardner, *id.*, page 480.
Sawyer *v.* Turpin, 91 U. S., 120–121.
Stevens *v.* Blanchard, 3 Cush., 169.

Paying cash for property purchased; making a loan; depositing in bank; these are but exchanges of value.

The principle is well recognized. For example, in the recent case of Jaquith *v.* Alden, 189 U. S., p. 82, referring to Pirie *v.* Chicago Trust Company, this Court said:

"It was held that a payment of money was a transfer of property, and when made on an antecedent debt by an insolvent was a preference with § 60a, although the creditor was ignorant of the insolvency and had no reasonable cause to believe that a preference was intended. The estate of the insolvent, as it existed at the date of the insolvency, was dimin-

ished by the payment, and the creditor who received it was enabled to obtain a greater percentage of his debt than any other creditors of the same class."

Then passing to the facts in the principal case, it is said:

"In these circumstances the payments were no more preferences than if the purchases had been for cash and as parts of one continuous *bona fide* transaction. * * * Payments * * * where the net result is to increase the value of the estate do not constitute preferential transfers under Section 60a."

In Cook *v.* Tullis, *supra*, it is said:

"There is no pretense that the property substituted was not equally valuable with that taken, or that the estate of the bankrupt was any the less available to his creditors. A fair exchange of values may be made at any time, even if one of the parties to the transaction be insolvent. There is nothing in the Bankrupt Act, either in its language or its object, which prevents an insolvent from dealing with his property, selling or exchanging it for other property at any time before proceedings in bankruptcy are taken by or against him, provided such dealing be conducted without any purpose to defraud or delay his creditors or give preference to any one, *and does not impair the value of his estate.* * * * His dealing will stand if it leave his estate in as good plight and condition as previously."

"The reason is that the exchange takes nothing away from the other creditors" (91 U. S., page 121).

Nothing that Stege Brothers did in any way impaired the value of their estate. The estate had a demand against the Bank worth 100% when Stege Brothers failed. Their estate was in as good a plight and condition as previously. The moment before the deposit they had, say $1,000 in the form of cash or a chose in action. The moment after it

they had $1,000 in the form of a chose in action against the Bank.

This passed to the trustee, subject to the duty and right imposed upon and given to the bank to set off its debt against its demand on the notes. *It was the Bankruptcy Act, not the bankrupt's act,* that has enabled the Bank to receive a greater percentage of its debt than other creditors of the same class.

The *deposits* do not have the *effect* of *enabling* one creditor to obtain, &c. They were liable to be drawn out the moment they were deposited.

They merely raised the relation of debtor and creditor.

If the *amount* of the deposits ever is applied upon the debt, *it is by force of the Bankruptcy Act itself. There* is the transfer worked that results in the creditor obtaining a greater percentage, &c.; then, for the first time whatever transfer is made is made by the act itself. The act requires the creditor and the estate and the trustee and the Court to recognize only the balance between the mutual debts as the debt which is to be paid, which "shall be paid."

Except for the Bankruptcy Act, this litigation could not have arisen; except for Section 68 the Bank would have had to pay to the Trustee the full amount of the deposits on hand, and would have proved for the full amount of the notes—(unless the common law right of banker's lien applied). How startlingly unjust, how the law is nullified, therefore, when the creditor is deprived of a right, and accused of violating the act, in letter or spirit, because he does what Section 68 expressly *commands* him to do.

How preposterous to argue that there are provisions in the act that ought to be twisted to nullify the plain provisions concerning mutual debts and credits. If technicalities are to be enforced, then we should insist that inas-

much as Section 68 is a later provision in the act than Section 60 and than Section 57*g*, the provisions of Section 68 should override anything seemingly to the contrary in prior sections. If the trustee insists on the most technical construction of the act, then we say that Sec. 68 means that notwithstanding anything said about preferences and transfers in prior sections, mutual debts must nevertheless be set off.

As Justice McKenna said in the Pirie case, 182 U. S., at page 449:

> "Undoubtedly all the sections of the Act must be construed together as means to effect its purpose, and some of its sections are closely related. It does not follow, however, that each section should not be given the meaning its language conveys, if clear and consistent. It does not follow that because the terms of a section are defined elsewhere, or the consequences of its provisions are elsewhere expressed, it becomes a nullity, or is defective. Not that we may not travel outside of any section if it be necessary to travel outside. * * * (p. 452): It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide should be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other and would be inconsistent unless the natural and common import of words by varied construction becomes necessary and a departure from the obvious meaning of words is justifiable. But if in any case the plain meaning of a provision not contradicted by any other provision in the same instrument is to be disregarded because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."

Applying the principles thus enunciated, let us

take a look at the provisions of the act, and we respectfully submit that the Court will readily see that the provisions as to set-offs and security and liens in the act must be treated as exceptions to the general rule concerning preferences.

The rules as to preferred creditors are found in Section 60.

Section 63 enumerates the debts which may be proved and allowed against his estate.

Section 64 expressly touches upon debts which have priority.

Section 65 deals with the declaration of dividends upon allowed claims, except such as have priority or are secured.

Section 67 then deals with liens, and expressly provides what liens can be allowed and what liens must be rejected. The fact that any liens are allowed indicates that the policy of the act does not absolutely forbid in each and every case some creditors obtaining a greater percentage of their debts than others.

Thus it is expressly provided that liens given or accepted in good faith and not in contemplation of or in fraud upon the act, and for a present consideration, should not be affected by the act. It is difficult to conceive of a lien being given which is not either accompanied by delivery or a contract for the delivery of property of the bankrupt. It is also provided that liens, judgments and attachments, &c., obtained through legal proceedings within four months shall be deemed null and void. Others, however, will stand.

Next comes Section 68, which provides, as we have already seen, that *in all cases* of mutual debts or of mutual credits between the estate of the bankrupt and a creditor, the account *shall be stated* and one debt *shall be* set off against the other and the balance only *shall be* allowed or paid, with certain exceptions, which, as we have already seen, have no application to the case at bar.

If this Court can be induced to accept the argu-

ment of the trustee, it will be the first case on record either under this or any other Bankrupt Act, where a set-off has not been allowed a banker. Set-off under bankruptcy acts has always been a feature of them and has always been allowed, and there could have been no oversight on the part of Congress in including banks and bankers within the provisions of set-off, and there is no justification for making an exception in their case from the universal provisions of the act requiring what in all cases of mutual debts, &c., shall be done.

The counsel for the trustee in the case at bar quotes from Justice McKenna's opinion where he was considering the meaning of the word "transfer" at page 444. "Transfer," he says, "is defined to be not only the sale of property, but every other mode of disposing or parting with property. All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every *means* and *manner by which property can pass* from the ownership and possession of another, and by which the result forbidden may be accomplished."

And counsel then proceeds to say that the subsequent words in the section as found in the act itself are the enumeration of three or four instances out of an infinite number, and given as examples. We respectfully submit that nothing in Justice McKenna's opinion indicates any such thing. The learned Judge, as we have said, was speaking of a payment on account of a debt, and arguing against the construction sought to be put upon it by counsel for the creditor. It was unnecessary for him to repeat the last words of Subdivision 25, and all that he did say about technicality and narrowness of meaning and comprehensive sense, &c., was directed to the use of the word "transfer" in any way in which a *transfer by any means or manner* could be made *as a payment*, and his opinion covered principally the question of whether a transfer

of money was a transfer of property. No question arose as to whether the transfer in that case was a *payment* or a *pledge* or a *mortgage* or a *gift* or *security;* because there was no doubt that if it was a transfer of property or a parting with property by any means or manner at all, it *was* a *payment.*

Again we would note the absurdity of giving instances out of the generality of cases already covered by the most comprehensive words. It would be as though one said with the intention not of limiting but of widening the scope of the general words, "I give you everything I possess, including my horse"

The real construction of Subdivision 25, we submit, is that the comprehensive statements in the first part of the clause are to be applied to the word "transfer" in whatever possible manner a transfer could be made or a parting of property could take place, when made as a payment, pledge, mortgage, gift or security.

The recent decisions upon this Section 68 of the statute have held these deposits a proper set-off and within the contemplation of the act.

In the case of *In re* Myers *et al.*, decided February 19, 1900, and reported in 99 Fed. Rep., at page 691, the identical question here presented came up for construction. At the time of the adjudication of bankruptcy of Myers, they had on deposit in the First National Bank of Crawfordsville the sum of $777.66, and were then indebted to that bank for borrowed money evidenced by notes not then due in the sum of $5,000. The Court held that this deposit could properly be set-off against the debt due to the bank, and a claim for the balance be filed.

> "The Bankruptcy Act provides that in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated, and one debt shall be set-off against the other, and the balance only shall be allowed or paid.

A deposit in a bank becomes, upon the bankruptcy of the depositor, a security for, and payment *pro tanto* of, his liability to the bank by the operation of the law of mutual credits. The Court undoubtedly possesses the power, in its discretion, and in a proper case, to allow proofs of debts to be amended and in case of *mistake or ignorance* either of fact or law, will generally exercise that power, in the absence of fraud and when all the parties can be placed in the same situation that they would have been in if the error had not occurred, and where justice seems to demand that the amendment should be made. This would seem to be such a case. The bank was entitled to retain the *amount on deposit to the credit of the bankrupts and apply the same upon the indebtedness of the bankrupts to the bank.* The changes made in the account touching the deposit, originally standing in the name of the bankrupts' have wrought no change in the actual possession of the money on deposit It has at all times since the bankruptcy occurred remained in the control and possession of the First National Bank. If the other creditors of the bankrupts should be held to be entitled to participate in this fund, they would receive, to that amount, so much more than in equity and good conscience they were entitled to. By allowing the bank to retain the sum of $767.66, the general creditors of the bankrupts will not be injured."

The same result was reached in the matter of Max Kalter, reported in 2 National Bankruptcy News, 264, in which Referee Mason, in his opinion, cites many cases and authorities in support of his decision. The facts in this case are almost identical with those in the action at bar. The proof of claim of the Fourth Street National Bank set forth an indebtedness on a note made by the bankrupt, and payable March 29, 1899, for $1,000, upon which was credited the sum of $89.50, the amount of the deposit of the bankrupt with that bank. The petition in bankruptcy was filed March

13, 1899, and before the note became due. Upon a motion for the reconsideration of this claim upon the ground that the bank had retained money, and unless it paid over the same to the Trustee is not entitled to its claim, Referee Mason held that the claim was provable and *the bank entitled to retain* the deposit. He did not seem to have any doubt but that the relationship between the bank and the bankrupts was that of debtor and creditor, and their mutual debts and credits might be offset one against the other, and the only question involving any material difficulty was as to whether or not there was a debt existing in favor of the bank upon the day of the adjudication of bankruptcy, as the note was not payable until after such adjudication.

The wording of the Act of 1867 in relation to set-offs is almost identical with Section 68 of the present act. The Act of 1867 provides:

> "In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other and the balance only shall be allowed or paid."

The section above quoted received judicial construction in several cases.

In Hough *vs.* First National Bank, (4 Biss., 349), a few days before an adjudication of bankruptcy the defendant, creditor by note of $1,000, aware of the insolvency of the bankrupts, and having in bank a general deposit of $772, previously made by the bankrupts, received a check by them for the said amount; deposited and applied the same on the note, in satisfaction of $772 thereof, and at the same time received from the bankrupts $228 in payment of the residue of the note. It was held that the transaction as to the check on deposit was a mere adjustment of mutual debts, and not a fraudulent preference within the meaning of the Bankruptcy Law of 1867. McDONALD, District Judge, saying: "It has been urged that this transaction cannot be a set-off of mutual debts because the note

was not due at the time. By the face of the note it was due on the very day on which the check was drawn, but it was governed by the law merchant; consequently it had three days of grace, and it was not demandable until three days after. But the note was mature on that day, and the makers had the right on that day to settle or pay it, and they did settle it by way of part payment and part set-off on that and on the subsequent day."

Blair *vs.* Allen, 3 Dillon, 109, and cases cited.

Ex parte Howard National Bank, reported in 2 Lowell, 487, is also in accord with the above quoted case.

In re Petrie, 5 Ben. 110, held that a bank had a right to apply a deposit on account of a draft maturing and protested five days before the failure of the bankrupt, the bankruptcy proceedings, however, having been subsequently commenced.

In *ex parte* Whiting, 2 Lowell, 472, a bankrupt was indebted to a creditor on two distinct debts, and one of them was secured by a pledge with power to sell. It was held on the principle of set-off that he could apply the surplus of the proceeds of sale to the payment of the second debt.

Kelly *et al. vs.* Phelan, 5 Dillon, 228, held that a banker has a lien on securities in his hands for a general balance of his account, which is good against the assignee in bankruptcy of the owner of the securities.

In re Farnsworth *et al.*, 5 Biss., 223, held that a bank to whom a bankrupt was indebted on a demand note had a lien on the proceeds of drafts delivered to it for collection by the bankrupt, though they were collected after the filing of the petition in bankruptcy.

Robinson *vs.* Wisconsin Bank, 18 Bankruptcy Rep., 243:

> "A bank holding a deposit of a bankrupt and also being his creditor by a note may receive a check from the bankrupt upon itself and surrender the note, though it has notice of the bankrupt's insolvency."

The cases are in accord with the above quoted decisions, but we believe that the cases cited above are sufficient to show that the bank pursued the correct policy in retaining the deposit and applying it to the debt of the bankrupts.

In the case of Meyer, 107 Fed. Rep., 86, Judge Thomas held, that a bank was entitled to have returned to it, so that it should come under its lien, the amount of a certain check which had been drawn against the bankrupt's funds and to hold this sum as an offset to notes held by the bank against the bankrupt.

In re Elsasser, 7 Am. B. Rep., 215.

POINT III.

The New York County National Bank had a banker's lien upon the balance of the general deposit account of the bankrupt for all indebtedness then due to it.

The case of Smith *vs.* The 8th Ward Bank, 31 App. Div. (N. Y.), 6, holds:

> "The rule may be broadly stated that a bank has a general lien on all moneys and funds of a depositor in its possession for the balance of the general account, provided that that account is due and payable."

Section 67c of the Bankruptcy Law has no application to this banker's lien and it is not voidable as being one acquired within four months of the ad-

judication of bankruptcy. It is not a lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, but a lien arising purely *by operation of law*. It does not in any sense arise by the act of the parties. A banker's lien is not given, is not received. It is identical in its nature with a mechanic's lien in some States, which arises by law merely upon the performance of the labor or the supplying of the material and should be distinguished from the mechanic's lien which is obtained by an act of the parties. This point of distinction has recently been well set forth *In re* Emslie, 102 Fed., 291 (C. C. A., 2d Cir.):

> "The lien itself under that system exists anterior to the notice and independently of it. Those liens arise as the work is done. They are strictly contemporaneous liens. They are given by the statute and received by the creditor for a present consideration within the spirit certainly, if not within the exact letter, of Section 67*d*."

In the case of National Bank *v.* Insurance Co., 104 U. S., 71, Mr. Justice MATTHEWS, speaking for the Court, said:

> "A banker's lien ordinarily attaches in favor of the bank upon the securities and moneys of the customer deposited in the usual course of business for advances which are supposed to be made upon their credit. It attaches to such securities and funds not only against the depositor, but against the unknown equities of all others in interest, unless modified or waived by some agreement, express or implied, or by conduct inconsistent with its assertion."

In Bank of Metropolis *vs.* N. E. Bank, 1 How., 289, Chief Justice TANEY, referring to the the general principle that a banker who has advanced money to another has a lien upon all securities in his hands for the amount of his general balance, says:

"We do not perceive any difference in particular between an advance of money and the balance suffered to remain upon the faith of these mutual dealings."

In Straus *vs.* Tradesmen's Natl. Bank, 122 N.Y. 379, it is said:

"As a rule, a deposit made in a bank by a person on general account becomes its funds, and the relation between the depositor and the bank becomes one of debtor and creditor, and in the absence of any agreement to the contrary, the bank is at liberty to apply the money upon a payment due it from the depositor (see Bank *vs.* Hughes, 18 Wend., 94; A. N. Bank *vs.* F. N. Bank, 46 N. Y., 82; Natl. Bank *vs.* Smith, 66 *Id.*, 271)."

In People *vs.* St. Nicholas Bank, 44 App. Div., (N. Y.), 313, it was held;

"A banker's lien attaches in favor of a bank upon securities and moneys of the customer deposited in the usual course of business for all indebtedness of the customer to it then actually due. The St. Nicholas Bank, as we have already seen, was at the time the warrant of attachment was issued the owner and holder of three promissory notes made by the Casualty Company (depositor), payable on demand and aggregating in amount the sum largely in excess of the amount on deposit. These notes were then due. The notes being due, the bank had a prior lien on this fund. As was said in Meyers *vs.* Bank, 36 App. Div., 482, 'when a depositor opens an account in a bank, that very act, in the absence of an agreement to the contrary, authorizes an appropriation of his deposit balance to any matured claims the bank may hold against him, the same as if he then executed an agreement in writing to that effect.'"

We submit that a banker's lien is not only a lien which springs purely by force and operation of law,

but is one which is also within the contemplation of law agreed to by a customer of a bank when he opens a deposit account. The case was directly before the Appellate Division in Meyers *vs.* N. Y. Co. Natl. Bank. The opinion of the Appellate Division is found in 36 App. Div. Reports, page 482. After citing cases which asserted the existence of a general banker's lien, the Court say :

> "Such being the law and commercial usage, when a depositor opens an account in a bank, that very act, in the absence of an agreement to the contrary, authorizes the appropriation of his deposit balance to any matured claims the bank may hold against him, the same as if he then executed an agreement in writing to that effect. This being so, we do not see how the present case can be distinguished in principle from that of Hatch *vs.* 4th Natl. Bank, 147 N. Y., 184. In the Hatch case, the bank held the deposit under a contract which authorized it to appropriate the deposit to the payment of all obligations and liabilities held by it, whether the liabilities were due or otherwise. It was held that, when the bank appropriated the depositor's balance to its claims, 'it acted with the written consent and authority of the firm as completely effectual and operative as if the debtors on that day had personally directed the application to be made.' While the agreement in the Hatch case gave the defendant greater rights than an ordinary banker's lien, that fact has no bearing on the doctrine just quoted ; that a previous authority to the bank to appropriate funds to the payment of a debt is the same in effect as an express direction given at the time of appropriation."

So when a customer opens an account with a bank he knows that if he goes into bankruptcy the Bankruptcy Law will compel the set-off of any mutual credits and debts.

Such being the rights of the parties when the bankrupts opened their account with the New York County National Bank, nothing in the Bankruptcy

Act justifies the trastee or the Court in displacing the contract or lien.

The rule is that, in general, the assignee does not stand in a better predicament than the bankrupt himself and can claim only what the latter might claim.

In re Emslie, 102 Fed., 291 (C. C. A., 2 Cir.)
Winsor *vs.* Kendall, 3 Story, 507.
Fisher *vs.* Hunt, 2 *Id.*, 582.
Foster *vs.* Hackley, 2 B. R., 406.
In re Leland, 10 Blatch, 503.
In re Lyon, 7 B. R., 182.

The Bankruptcy Act entirely recognizes liens, whether State or common law, so long as they were not liens given in violation of the specific terms of the act.

Falls City Shirt Co., 3 Amn. Bankruptcy Rep., 437.
In re Byrne, 3 *Id.*, 268.
In re Beck, 2 Natl. Bankruptcy News Rep., 533.
In re Lowenstein, 2 Natl. Bankruptcy News Rep., 71.
In re Brown, 104 Fed., 762.
In re Gillette, *Id.*, 769.

A recent case, that of *Re* Kellar, in the Northern District of Iowa, reported 110 Fed., 348, may be cited for the Trustee. The case, however, is clearly and readily distinguishable from that at bar. In the Kellar case, *after the indebtedness had become due to the bank, after an overdraft had been made by the bankrupt on the bank*, the bankrupt deposited a sum of money; *which the bank applied upon the overdraft, before the bankruptcy* which fact, it is quite plain, constituted a payment directly in reduction of the indebtedness *on the deposit account* which, under the broad rulings of the Pirie case, constituteda preference, because it

clearly enabled a then existing creditor with a due debt to obtain a greater percentage of his debt than others.

FIFTH POINT.

This Appeal is Rightly Taken.

This Court has jurisdiction of this appeal. The Bankruptcy Act provides as follows, Section I, Subdivision 3, that the words "appellate courts" as used in the Act shall include the Circuit Court of Appeals of the United States, Supreme Courts of the Territories and the Supreme Court of the United States.

By Section 24 *b*, it is provided:

> "That the several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise any matter of law in the proceedings of the several inferior courts of bankruptcy within their jurisdiction; such power shall be exercised on due notice and petition by any party aggrieved."

The matter was taken to the Circuit Court of Appeals upon the Referee's certificate purely on matters of law, whether upon the facts certified by the Referee the alleged preference should be restored. While in form the matter went to the Circuit Court of Appeals on the appeal of the trustee, we suppose that the superintendence and revision provided for could be exercised without regard to the manner in which the case became before it, if the Circuit Court of Appeals was satisfied to exercise its powers of superintendence and revision.

Section 25 also provides:

> "(*b*.) From any final decision of a Court of Appeals, allowing or rejecting a claim under

this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States in the following cases and no other.

1. Where the amount in controversy exceeds the sum of $2,000 and the question involved is one which might have been taken on appeal or writ of error from the highest court of the State to the Supreme Court of the United States."

The amount in controversy here exceeds the sum of $2,000; and the question involved is one which might have been taken on appeal or writ of error from the Court of Appeals of the State of New York to this Court.

The question at bar is not one of State Law or Common Law which might arise in a bankruptcy case, but is purely and simply one that has no entity, could not arise, except upon the bankruptcy act. If, therefore, this question arose in a State Court and got into the State Court of Appeals, for example in a suit to recover money paid on a preference and the question was whether the *deposit* was a preference, this question arising under the Bankruptcy Act, could be taken from the New York Court of Appeals to this Court; for example in the case of Matthews *v.* Hardt, 79 App. Div. (N. Y), 570, the plaintiff as trustee in bankruptcy sued Hardt and others, and the question in the case was whether a certain transfer constituted a voidable preference under the Bankruptcy Act (page 578). This question it was said "was to be determined in accordance with the sixtieth section of the act, which provides as follows, &c."

It was finally held that the transfer complained of was a voidable preference.

Assuming that case to be appealed to the N. Y. Court of Appeals, the question is whether the transfer constituting a voidable transfer under the Bankruptcy Act would be appealable to this Court from the Court of Appeals.

The Pirie Scott case, 182 U. S., 436, which in-

volved a question of preference and arose out of an application to expugne the creditor's claim, unless an alleged preference was surrendered, went to the Supreme Court from the Circuit Court of Appeals in the 7th Circuit. In that case, at page 439 are findings and conclusions of the Circuit Court of Appeals in the 7th Circuit.

So also was the case of Hutchinson *vs.* Otis, 190 U. S., 552.

In November, 1898, this Court adopted and established "Rules in Bankruptcy," whereby this Court directed that rules be adopted and established as General Orders in Bankruptcy.

By Rule 36, it is provided, that appeals under the act to the Supreme Court from a Circuit Court of Appeals shall be taken within 30 days after the judgment and decree, and shall be allowed by a judge from the court appealed from or by a Justice of the Supreme Court.

And it is further provided that in every case in which a party is entitled to appeal to the Supreme Court, the Court from which the appeal lies, shall at or before the time of entering its judgment or decree, make and file its findings of fact and its conclusions of law thereon, stated separately. Such findings and conclusions of law were made (24).

Assuming, however, that the practice of bringing this case here on appeal was wrong, this Court may order certiorari on the record before it, and we should respectfully pray that that be done in case this appeal has been erroneously prosecuted. Such was the practice in the case of Trust Co. *v.* Bent, 187 U. S., 237.

The question involved is of great importance to the Banking world ; it is presented here in a simple form—purely as one of law.

LAST POINT.

The order appealed from should be reversed, and the claim of the New York County National Bank should be allowed as filed, and the rulings of the District Court and the Referee affirmed.

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